

# The von der Leyen Commission and the Future of the Rule of Law

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**re:constitution** Exchange and Analysis on Democracy and the Rule of Law in Europe

## 1 Uninspiring Rhetoric

Ursula von der Leyen's promotional tour before her election did not turn out well. Many, including her compatriots criticised her [weak stance on the rule of law](#). After being nevertheless voted in – with the support of the two autocratic Central Eastern European governments against whom Article 7 TEU procedures are pending – she made a rather infamous statement in the [Süddeutsche Zeitung](#). She claimed, there were dividing lines between Eastern and Western member states of the European Union. But von der Leyen failed to point to [substantive rule of law issues](#), rather she traced back the division to emotional components: allegedly Eastern states do not feel to be fully respected. This very much corresponds to Hungarian Prime Minister Viktor Orbán's stance, who warns the EU from any intervention: "When they question the rule of law, they [step on our honor](#)."

Adding insult to injury, von der Leyen added that "We all have to learn that achieving the full rule of law is always what we are aiming at, but [nobody is perfect](#)". It is an affront to equate half of the electorate with the governments they voted against, including citizens from authoritarian states whose last stray of hope to halt rule of law backsliding was external intervention. They now feel "[disappointed, frustrated – but most of all: betrayed](#)".

Curbing election laws, capturing the judiciary, and mass fundamental rights violations in Hungary for example led Freedom House [conclude](#) – for the first time since the democratic transition in 1989/90, and for the first time in EU history – that an EU Member State is to be downgraded from "free" to a "partly free country". In light of these sustained attacks on the country's democratic institutions by the government, von der Leyen's statement is a polite euphemism at best, or an evidence proving that the Commission President is oblivious to reality, or even worse: she seems to turn a blind eye to gross and systemic violations of values enshrined in the Lisbon Treaty. Some of von der Leyen's other symbolic moves also proved that she was ready to compromise values for political convenience: Baptising

the migration portfolio's holder as Vice-President for "Protecting our European way of Life" was heavily [criticized](#) for normalising hate mongering, xenophobia, and giving in to the far right in general.

But let us have a look beyond the ignorant political rhetoric of the President elect and explore what the new Commission might entail for the rule of law. The [organigram](#) of the future Commission is rather complex, and the issue of the rule of law is overarching, but its enforcement seems to be divided among three Commissioners: the Vice-President for Values and Transparency; the Commissioner for Justice; and the Commissioner for Neighbourhood and Enlargement. I shall begin with the first two portfolios, related to the rule of law internally within the EU, and discuss neighbourhood and enlargement policy separately.

## 2. Internally Focused Portfolios

### 2.1 Vice-President for Values and Transparency

The lack of a Commissioner entrusted specifically with rule of law issues is what strikes one at a first glance. Whereas First Vice-President Frans Timmermans used to be responsible for the rule of law and the Charter of Fundamental Rights, he is now entrusted with a different portfolio – the European Green Deal – and his successor's, Věra Jourová's position is entitled Vice-President for Values and Transparency now. Her title is thus lacking any specific reference to the rule of law (or fundamental rights for that matter) whereas transparency, nowhere mentioned in Article 2 TEU, is "upgraded" with no clear rationale having been offered for this. Such a change might indicate a lesser emphasis on the rule of law, but at the same time might also make sense with special regard to the [triangular](#) nature of democracy, the rule of law and fundamental rights, where these three values "cannot be separated without inflicting profound damage to the whole and changing its essential shape and configuration".

According to the [mission letter](#) that was sent by von der Leyen, Jourová will have a wide portfolio covering multiple topics including the *Spitzenkandidaten-Prozess*, electoral laws, transparency of the legislative process, European identity, European citizenship and the European Citizens' Initiative. Looking at this list and potential overlaps, one may wonder how the Commissioner for Democracy and Demography will kill her time in office. Jourová will also have some rights-related tasks, such as EU accession to the ECHR, the Charter of Fundamental Rights, dialogue with churches and religious associations or communities, as well as with philosophical and non-confessional organisations.

This already extensive portfolio is further extended by the duty of making democracy resilient, promoting, strengthening and defending the EU's rights and values, and upholding the rule of law. With regard to this latter task, the Vice-President will work closely with the Commissioner for Justice, the prime responsible for enforcing the rule of law in the member states.

## 2.2 Commissioner for Justice

The Commissioner for Justice has the key job to enforce the rule of law in the Member States. The position will be held by current Belgian Foreign Minister Didier Reynders.

Looking at the organisation chart, it is unclear how the issue of the rule of law will be divided between Reynders and the Vice-President for Values and Transparency who is overseeing the Justice Commissioner. But since Reynders will hold the only Commissioner position subordinated to the Vice-President, the question arises whether it makes sense to create a hierarchy between the two in the first place.

Some tasks enshrined in the [mission letter](#) are remotely or only indirectly related to the rule of law, such as rights derived from European citizenship, consumer protection, the use of new digital technologies, artificial intelligence, the fight against terrorism, the setting up of the European Public Prosecutor's Office, the implementation and enforcement of the General Data Protection Regulation, or company law supporting small and medium-sized businesses.

Other tasks in Reynders' portfolio are strictly rule of law related, even though self-evident, such as taking cases to the CJEU, which the Commission does by law as guardian of the treaties in the form of infringement cases. Additionally, the Commissioner for Justice will be entrusted with strengthening the cooperation on rule of law matters with international organisations, such as the Council of Europe, the OSCE and the OSCE. Reynders will lead the Commission's work on the comprehensive European Rule of Law Mechanism and coordinate the Commission's annual reporting. He will focus on communication and awareness-raising with regard to rule of law problems; will prevent and identify breaches; and propose effective, proportionate and dissuasive responses.

## 2.3 The Keys to Success

Whereas von der Leyen's rhetoric has been uninspiring so far from a rule of law perspective, and the future Commission design leaves a lot to be desired (see the overbroad portfolios the overlapping subjects, the lack of specific reference to values, the structure, etc.), the proof of the new Commission's stance will be in the substantive moves. Here the Commission's Communication on the [State of play and possible next steps](#) of April 2019 and its [Rule of Law Blueprint for Action](#) of July 2019 provide some guidance (assessed in detail by Pech, Kochenov and others [here](#) and [here](#)). Let me formulate a few requirements for Commission action to be successful in the area of the rule of law.

### Emphasis on Enforcement, the Limits of a Discursive Approach

Both von der Leyen in the already referenced interview entitled "[Not the worst threat right at the beginning](#)", and the Blueprint emphasize that response must be a last resort. Reynders also seems to [believe](#) that discussion is the key to rule of law problems – at least his name is associated with the [Belgian-German](#)

[proposal](#) for a Periodic Peer Review of the Rule of Law in the EU, which would set up a regular interactive discussion on an expert level, and on a political level in the General Affairs Council. This shows that key political actors still believe in prevention and dialogue without intervention. And indeed, the discursive approach might work well with member states that respect the rules of the game and in the overall assessment adhere to the concept of liberal democracy. But when it comes to systemic rule of law backsliding the strength of any EU reaction will depend on whether the Commission recognises that effectiveness hinges on the “response” or “enforcement” prong. The Commission must realize after a decade of rule of law violations in Hungary and with several member states joining the illiberal club that any other approach is entirely [ineffective](#) vis-à-vis rogue governments. There should be room for member states under review to present their arguments and pieces of evidence underpinning their positions. But once it becomes clear that a government acts in bad faith, the Commission should acknowledge that further dialogue will only result in granting sufficient time to complete the capture of state institutions and solidifying an authoritarian state structure.

### **Dialogue v. Mockery of a Dialogue, Abuse of Concepts**

A related issue is the need to recognise when parties engage in a meaningful debate and when governments just [abuse](#) (typically legal) concepts to pretend there was a dialogue. A common tactic is a reference to the [vagueness](#) of the rule of law contending it was an elusive term. In reality however, the Commission itself offered a [definition of the rule of law](#) back in 2014, inspired by the Venice Commission’s [Rule of Law report and checklist](#) of 2011.

The other approach by rogue governments is claiming that there was an alternative (perhaps Central Eastern European) understanding of the rule of law / constitutionalism / constitutional identity that must be respected by Western states. Even if these were genuine claims (which they are not, see [Kelemen and Pech](#)), the Commission should make clear that these concepts cannot be used to go against European minimum standards, neither can they be employed as a *carte blanche* authorization to overwrite EU laws. But most importantly, the Commission should recognize that these claims do not form parts of multi-level constitutionalism, and shall be deconstructed as simple delusions that are only created either to escape liability for violating the rule of law and democracy or to gain more time in doing that (see below). Agreeing with the succinct explanation by [Kovács and Tóth](#), there is “a crucial difference between a dialogue among constitutionalists within the framework of constitutional democracy and a dialogue with delegates of a constitutional simulacrum.”

### **The Time Element**

That leads me to my next point that time is on the side of those destroying the rule of law. As distinguished scholars on this [blog](#) reminded us, “[c]alling for more dialogue while simultaneously normalising the systemic, deliberate and deceitful annihilation of checks and balances we are witnessing in both Poland and Hungary on the ground that ‘nobody’s perfect’ constitute an approach which will only lead

to more time being wasted even while rule of law backsliding is spreading to more EU countries and endangering the very survival of the EU legal order.” The EU’s constitutional system should imply the existence of robust precautionary measures against anti-constitutional tendencies and forces. As we have argued earlier this year (see [here](#)), the only tested legal remedy against rule of law backsliding so far seems to be the use of expedited and prioritized infringement procedure in conjunction with interim measures to prevent more harm from being done.

### **Contextual Assessment by an Independent Body**

When assessing member states – which will happen along the so-called Rule of Law Review Cycle (RLRC) according to the Blueprint –, further factors need to be considered. As we argued [earlier](#), a “rule of law evaluation shall be a nuanced exercise, and particular care shall be taken to make a contextual analysis and not to rely on a standardised benchmarking system that could veil or blur problems – thereby doing more harm than good”. A tick the box type of assessment may allow governments to hide their real objectives by pointing to international examples and claiming that there was nothing unique about their policies. Whereas it may be true that formally a state employed some legal transplants working well in other jurisdictions, a qualitative analysis might reveal that foreign legal transplants were taken out of context, or other countries’ [worst practices](#) were borrowed and combined.

A related challenge is the preservation of the RLRC’s legitimacy when autocratic governments question the validity of EU condemnations and challenge the legitimacy of the critic. The concept of a political Commission will only make the attack easier. As [Kochenov](#) convincingly proved, the “perceived politicization has [already] fundamentally undermined the EU’s action in an area of most fundamental concern: its rule of law and democratic nature.” One could have hoped that von der Leyen abandons this concept, given that she could not point to a mandate from the European Parliament. But evidence suggests the contrary.

She has her own political agenda including gender equality and an environmental policy with a [leftish-green](#) flavour. Von der Leyen also defines this Commission as a [geopolitical](#) one, stressing that “what we do at home will affect our place in the world and will shape relations with our strategic partners and competitors” (see the [mission letter](#) sent to the High Representative for Foreign Policy and Security Policy). Further she talks about an EU that is [guardian of multilateralism](#), avoiding the language of “guardian of the treaties”.

So as to avoid the easy criticism that the critic is too political in the sense of not being neutral, a body detached from any political institutions shall be at the core of rule of law assessment.

Should all the above factors be taken into account, the RLRC will have a chance to tackle the problem of rule of law demise. Also, it will be very similar to the European Parliament’s 2016 [proposal](#) on an EU mechanism on democracy, the rule of law and fundamental rights. It would be beneficial to know whether the RLRC is supposed to complement or overwrite it.



## 3 The External Rule of Law Related Portfolio

### 3.1 Commissioner for European Neighbourhood and Enlargement

Some other concessions von der Leyen made when designing the future Commission reinforce the suspicion that she is willing to compromise the rule of law whenever required for political gains. At the time of writing, it seems that both member states currently subject to [Article 7](#) TEU proceedings for clear risks of serious breaches of the rule of law (Poland) and all of the values laid down in Article 2 TEU (Hungary) get the positions they wished for. In the case of Hungary this will be the portfolio for neighbourhood and enlargement. The Commissioner will be entrusted with overseeing whether candidate or neighbouring countries are fulfilling the Copenhagen criteria, or in the language of the [mission letter](#), whether they ensure the rule of law, the fight against corruption, the role of an independent media and civil society. In other words, the Hungarian Commissioner will be responsible for overseeing respect for values that his or her government has been systematically and deliberately undermined as made clear as early as 2013 by the European Parliament's [Tavares report](#). The Hungarian expression "setting the goat to watch the cabbage" comes to mind. As [Végh](#) argues, the nomination would "further undermine the already weakened normative power of the European Union in its own neighbourhood." Equally important is the perception by third countries: they will undoubtedly see such a political decision "as a [betrayal](#), an abandonment by the EU."

### 3.2 Calling a Spade a Shovel

The first Hungarian candidate, former Justice Minister Trócsányi was [rejected](#) by the European Parliament's Committee on Legal Affairs (JURI) "on the grounds of conflicts of interest". The law firm he founded carried out tasks for the Hungarian government, and especially the [Russia-related](#) contracts bothered those who voted him down. These are severe issues, but they shall not hide the fact that Trócsányi was Justice Minister during a period which led the EU to have an Article 7 TEU procedure opened against Hungary. His name is connected to the establishment of a controversial [administrative court system](#) (which the government first [suspended](#), and seems to [abandon](#) it altogether now, due to international pressure); it was under his ministership that people were sent to prison for being [homeless](#); the ECtHR had to intervene again and again so that asylum seekers are given [food](#) in the transit zones; and the list goes on. Dumping him on grounds of conflict of interest is like sentencing Al Capone for tax evasion. It is easier to prove but does not even come close to the real issue.

To prevent any misunderstandings: I am not singling out and equalling individuals to gangsters. Neither am I introducing such a metaphor for governments abusing the law when violating the rule of law. (My peers did this, coining unconquerably creative terms such as [constitutional vandalism](#), [legal hooliganism](#), [constitutional barbarism](#), or the [Belarusisation of the EU from within](#).) Instead I criticise the *EU* for framing the issue the wrong way. Because asking the right legal questions is half the victory.

Should the problem be misconstrued as an individual issue of a single politician, the Hungarian government can just replace him (and indeed Viktor Orbán was quick to [nominate](#) Olivér Várhelyi, a [controversial](#) but experienced diplomat, Hungary's ambassador to the EU). Instead the allocation of portfolios shall reflect that the problem is not located in one particular nominee. In order to be true to the idea of Article 2 TEU values, Portfolios should have been [reshuffled](#). Nobody who served under a government destroying the rule of law should be entrusted with overseeing the very same value externally. Otherwise von der Leyen's [promise](#) "to defend our common values and uphold the rule of law" sounds nothing but an empty slogan, a masquerade, undermining the Commission's credibility.

Instead of taking the rule of law seriously along the above lines, von der Leyen invited governments to nominate [female candidates](#). Gender balance is important, but in the light of the severe consequences rule of law rot in some of the member states has for the whole EU construct, such a requirement is nothing but a *mouche* on the ugly face of emerging authoritarianism in the heart of Europe. (And not even this cosmetic requirement was respected. Hungary got away with not nominating candidates from both genders, as von der Leyen ultimately [approved](#) the second Hungarian male nominee.)

But let's not rush into things. We shall evaluate the von der Leyen Commission on the basis of what it will *do* in terms of the rule of law, and not what they *say* – no matter how ill-advised or misguided the Commission President's rule of law pronouncements have been to date.

